Supreme Court, U.S.
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No. 00-701

In The

Supreme Court of the United States

THE CITY OF SIMI VALLEY,

Petitioner,

v.

PHILIP YOUNG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CITY OF LOS ANGELES, ET AL. AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICI CURIAE*

The *amici* are 42 California general law and charter cities who have the authority under the Constitution and laws of the State of California, as well as local ordinances, to enact and enforce zoning and building regulations to protect the public health, safety and welfare. Although the rules and regulations may vary among jurisdictions, uniformly they require an initial application which must first be reviewed for completeness and compliance with applicable regulations before a permit is issued. There is no right to proceed with a project until a valid permit has been issued and changed circumstances during the application process may ultimately cause the permit application to be denied.

In this case, the City of Simi Valley approved another application for a permit before respondent's application for an adult nude dancing establishment, causing his request to be denied. The Ninth Circuit determined that the provision of the Simi Valley Code which allowed for such an eventuality was facially invalid under the First Amendment. There is, however, no such provision in the Simi Valley municipal code. The complained of "sensitive use veto" is not a veto at all, rather it is a practice or procedure of general applicability upheld by the California courts that says that the factors that exist as of the date of the final decision on a permit control its approval or denial, not those factors which existed at the time an application is filed.

Thus, the court's decision has placed in jeopardy the zoning and building regulations of all California cities. Not only has the Ninth Circuit created a legal right where

none existed before, its decision permits aggrieved developers to avoid a showing of "as applied" invalidity in favor of a direct facial constitutional challenge to building and zoning ordinances. This conflicts with this Court's standing requirements. Under the rationale of the court below, any business, not just an adult entertainment business, that is able to allege some real or imagined nexus to the First Amendment can obtain preferential standing in federal court, guaranteeing that federal courts will become the board of zoning appeals of first resort for local land use controversies.

Amici submit that the decision below is fundamentally incorrect and represents a marked departure from established precedent thereby severely restricting the ability of *amici* to effectively enforce generally applicable building and zoning laws. For these reasons, this Court should grant *certiorari* and reverse the decision of the Ninth Circuit.

RULE 37 STATEMENT

The Brief of the *Amici Curiae* in Support of the Petition for Writ of Certiorari is filed pursuant to Rules 37.2 (a) and 37.4 of the Rules of the Supreme Court of the United States. Written consent of all the parties has been obtained and proof of consent will be filled with the Clerk of the Court concurrently with the Brief of *Amici Curiae*.

ARGUMENT

The Decision Of The Court Of Appeals Is In Direct Conflict With The Holdings Of This Court In *Broadrick v. Oklahoma* And *Members Of The City Council v. Taxpayers For Vincent.*

This lawsuit is the result of the denial of a permit to open an adult nude dancing establishment by the City of Simi Valley (City). The City's zoning code (App. D, at 57a-67a*), as do most zoning ordinances regulating the location of adult businesses, provides a buffer distance between the adult business and traditionally protected or sensitive land uses such as churches and schools. App. D, at 63a-64a. After the permit application was submitted, but prior to its final approval, two events occurred which caused the denial of the permit. First, it was discovered that the proposed location for the dance club was within 500 feet of an existing sensitive use, a youth oriented karate school. The existence of this youth oriented business would have prevented the issuance of a permit for that site. App. A, at 8a-9a. Second, a sensitive use under the City's ordinance, an adult bible class operated by a qualifying religious organization, the Joshua Institute, received a permit to operate within the buffer zone surrounding the adult club, thus providing an additional reason to deny the permit for the adult use. App. A, at 6a-7a.

The owner of the proposed adult business, Philip Young, appealed the denial of his permit application to

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* References are to the appendices to the Petition for Writ of Certiorari filed by the City of Simi Valley filed October 30, 2000 and docketed November 2, 2000.

the City Planning Commission and the City Council. The Planning Commission determined that compliance with the buffer provisions of the zoning ordinance was to be determined as of the date of the project approval, not the date that the application was filed. App. A, at 8a-9a. Further, the Commission determined that irrespective of the presence of the Joshua Institute, the application was properly denied because of the existence of the karate school. App. A, at 9a. The City Council affirmed. App. A, at 9a.

The Court of Appeals held for Mr. Young on the grounds that the "sensitive use veto" was facially unconstitutional, analogizing, *inter alia*, to *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). App. A, at 22a-24a. In doing so the court made several fundamental errors. First, the City's adult businesses zoning ordinance (App. D) does not contain a provision delegating zoning approval to third parties, nor does the majority opinion cite to any other provision of the Simi Valley municipal code which purports to authorize such a delegation to a third party. As discussed below, the City's determination to look to the date of approval for disqualifying factors, not the date an application is filed, is not a veto. The right to build does not occur until the permit is issued. Second, the court studiously ignored the impact of the pre-existing sensitive land use, the karate school, requiring the City to issue a concededly invalid permit.

The constitutional issue raised by the court's decision, and a matter of the greatest concern to the *amici*, is the almost cavalier manner in which the Court of Appeals ignored this Court's standing rules to strike as facially invalid the non-existent sensitive use veto, rather than

conducting an "as-applied" inquiry as required by *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) and *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984). Although the court's analysis can be dismissed as nothing more than the Ninth Circuit's continuing hostility to municipal zoning ordinances regulating the location of sexually explicit adult entertainment businesses authorized by *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41(1986), the practical effect has greater implications. Local building and zoning regulations can now be directly challenged as facially invalid by a litigant who can allege any nexus to the First Amendment and then create a potential for unconstitutional application to anyone who might apply for a permit. The probability of such litigation resulting from the decision below is of great concern to *amici*, but of greater concern is that long standing zoning and building regulations will no longer be effective in protecting the public health, safety and welfare.

A. There Is No Sensitive Use Veto.

An application for a permit is just that, an application. A developer is not entitled to a permit as a matter of course upon filing an application, and must comply with those laws which are in effect at the time of approval, including laws enacted after the application was filed. *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal.3d 785, 795, 132 Cal.Rptr. 386, 390, 553 P.2d 546, 552-553 (1976), *cert. den.*, 429 U.S. 1083 (1977). Moreover, even a reviewing court must "apply the law in

existence at the time of its decision rather than at the time the permit was denied . . . to prevent an appellate court from issuing orders for the construction of improvements contrary to presently existing legislative provisions." *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 125, 109 Cal.Rptr. 799, 809, 514 P.2d 111, 121 (1973).

There is no entitlement to a building permit as a matter of course even if there is compliance with local zoning and building codes. *Guinnane v. San Francisco City Planning Com.*, 209 Cal.App.3d 732, 736, 257 Cal.Rptr. 742, 744 (1989), *cert. den.* 493 U.S. 936 (1989). A developer has no entitlement where the permit is invalid. *Pettitt v. City of Fresno*, 34 Cal.App.3d 813, 820-823, 110 Cal.Rptr. 262, 266-268 (1973). There is no right to complete construction where the permit was issued upon incorrect facts. *Stokes v. Board of Permit Appeals*, 52 Cal.App.4th 1348, 1357, 61 Cal.Rptr.2d 181, 186 (1997). Even if a permit is issued, no right to complete the project "vests" unless an owner can demonstrate that he has performed substantial work and incurred substantial liability in good faith reliance on a validly issued permit. *Avco Community Developers, supra*, 17 Cal.3d at 791, 132 Cal.Rptr. at 390, 553 P.2d at 550.

California precedent thus sensibly recognizes that the vagaries of the development process are such that permit applications may be denied due to changed conditions during the approval process. The Ninth Circuit did not accept this and converted routine practice and procedure into an unconstitutional delegation of the police power to private parties. It is settled in California that the exercise of the police power, including enforcement of land use regulations, cannot be delegated to others and such a

delegation is invalid as against public policy. *Avco Community Developers, supra,* 17 Cal.3d at 800, 132 Cal.Rptr. at 396, 553 P.2d at 552-553. A review of the City's adult zoning ordinance (App. D) shows that there is no express delegation to third parties the right to approve or disapprove an adult business.

Nonetheless, the Court of Appeals felt compelled to analogize the judicially approved practices and procedures to this Court's holdings in *J.E. Eubanks v. City of Richmond,* 226 U.S. 137 (1912) (property owners have right to establish building set-back lines) and *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116 (1982) (liquor licenses issued subject to the approval of churches and schools) which invalidated statutes that expressly delegated governmental authority to private parties. App. A, at 22a-24a. It is also important to note that unlike the standardless discretion vested in third parties which concerned this Court in those cases, the factors for approving or denying a permit in Simi Valley meet objective statutory criteria: an adult business is either within a buffer zone or without. Thus, the myriad of potential entanglement and procedural due process issues discussed in the cases relied upon by the court below are simply not relevant to this inquiry.

B. The Court Of Appeals Improperly Allowed Standing For A Facial Challenge To The Non-Existent Sensitive Use Veto.

Rather than addressing its procedural dues process concerns in the traditional "as-applied" manner favored by this Court, the Ninth Circuit determined that it was

proper to proceed with a direct facial challenge. App. A, at 12a-13a. In doing so, the Court of Appeals materially misapplied this Court's precedent permitting standing to facially challenge laws under the First Amendment overbreadth exception in only the most exceptional of circumstances, creating a conflict with this Court's holdings in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) and *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

Assuming that the well established and generally applicable California rule that one is not entitled to a permit as a matter of course upon filing an application was somehow unconstitutionally applied by the City in this case to deny Young his permit for an adult nightclub, the proper challenge is an "as-applied" challenge. Instead, the Court of Appeals allowed Young standing to facially challenge a non-existent provision of the Simi Valley ordinance thereby ignoring this Court's admonition that the facial overbreadth doctrine should be used "sparingly and only as a last resort" because "it is, manifestly, strong medicine." *Broadrick, supra*, 413 U.S. at 614.

Standing to make a facial challenge is now the remedy of first choice in the Ninth Circuit. *Broadrick* recognized, however, that the overbreadth doctrine should not be applied to invalidate a law "against conduct that is admittedly within its [the state's] power to proscribe" (*id.*, 413 U.S. at 615) and "that whatever defects may exist are best resolved through case-by-case analysis of the fact situations to which its sanctions [the law's] may not be applied." *Id.*, 413 U.S. at 615-616. Clearly, given this Court's decisions in *American Mini Theatres, supra* and

Renton, supra, the Simi Valley adult business zoning ordinance can be constitutionally applied to businesses such as Young's proposed club. Moreover, the California principle that there is no right to a permit based simply upon making application for one is a rule of general applicability, otherwise benign with respect to the First Amendment and Mr. Young's nude dance club. The fact that this principle "presents a First Amendment *issue,* is not necessarily to say that it constitutes a First Amendment *violation.*" *Taxpayers for Vincent, supra,* 486 U.S. at 803-804, (1984) quoting *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 561 (1981) quoting, Burger, C.J., dissenting, emphasis in the original.

The insignificance of the "First Amendment *issue*" here for purposes of a facial challenge is amply demonstrated by this Court's precedence relied upon by the Ninth Circuit in permitting Mr. Young to have standing to facially challenge the chimerical sensitive use veto. In *Broadrick, supra,* (App. A, at 11a) this Court declined to facially invalidate an Oklahoma statute restricting the political conduct of state employees. *Broadrick, supra,* 413 U.S. at 615-616. Similarly, in *Taxpayers for Vincent, supra,* (App. A, at 12a) this Court rejected a facial challenge to a Los Angeles City ordinance which prohibited the posting of signs, including political signs, on public property. *Taxpayers for Vincent, supra,* 486 U.S. at 802. In comparison to the First Amendment issues in those cases, the issue here can best be considered *de minimis.* The Court of Appeals also relied on *Clinton v. City of New York,* 524 U.S. 417 (1998) (App. A, at 13 a) where this Court held that the 1996 Line Item Veto Act was unconstitutional because its cancellation provisions violated the Presentation Clause

of the Constitution, Art. I, § 7, cl. 2. *Id.* at 420-421. Again, although the instant matter is very important to Mr. Young, it simply does not rise to the constitutional dimension reflected in *Clinton v. City of New York* to warrant standing to undertake a facial challenge to the Simi Valley permit approval procedures.

CONCLUSION

The decision of the Court of Appeals to permit a direct, facial constitutional challenge to long established California practices and procedures governing the application process for zoning and building permits is contrary to this Court's decisions limiting facial challenges to only the most extreme situations. As a result of the Ninth Circuit's ill considered ruling, the ability of municipal governments to effectively enforce their building and zoning laws for the public benefit is put at jeopardy. The lower court's divergence from this Court's standing requirements for facial challenges can only be resolved by this Court's grant of the Petition for a Writ of Certiorari filed by the City of Simi Valley. Further, given this marked divergence from the principles set forth by this Court in *Broadrick* and *Taxpayers for Vincent*, it is respectfully suggested that this case is appropriate for summary

disposition in accordance with Rule 16.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

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